

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

JOSEPH L. DEXTER, an  
individual, SHIRLEY A. DEXTER,  
an individual

NO. CIV. S 04-2643 MCE JFM

Plaintiffs,

v.

MEMORANDUM AND ORDER

FORWARD AIR, INC., a Tennessee  
corporation; STARWOOD HOTELS &  
RESORTS WORLDWIDE, INC., a  
Maryland corporation; THE  
HERTZ CORPORATION, a Delaware  
corporation,

Defendants.

-----oo0oo-----

Through the present action Forward Air, Inc. ("Forward Air")  
has moved for leave to add a third party, Randall K. Cook  
("Cook"). For the reasons set forth below, Forward Air's motion  
is denied.<sup>1</sup>

---

<sup>1</sup>Because oral argument will not be of material assistance,  
the Court orders this matter submitted on the briefs. E.D. Cal.  
Local Rule 78-230(h).

1 This action arises out of a multi-vehicle rear end collision  
2 that occurred in the city of Houston, Texas on December 14, 2003.  
3 Immediately prior to the accident, Cook rented a Nissan Altima  
4 from Defendant Hertz Corporation ("Hertz"). Upon leaving the  
5 rental location and while en route to the Bush International  
6 Airport, Cook's right front tire suddenly blew out. Cook was  
7 driving in the number 2 lane of a unidirectional on-ramp. He  
8 immediately stopped the vehicle, but remained in the lane of  
9 travel. Upon Cook's abrupt stop, a taxi, an SUV, and a Sheraton  
10 Hotel courtesy/shuttle van were forced to an immediate stop in  
11 the same lane behind him. A fourth vehicle, a tractor-trailer  
12 owned and operated by Defendant Forward Air, was unable to stop  
13 and rear ended the Sheraton van in which Plaintiff Joseph Dexter  
14 ("Dexter") was a passenger. Dexter suffered severe injuries in  
15 the accident and, on December 14, 2004, he and his wife filed  
16 this diversity action seeking compensation for personal injuries  
17 and loss of consortium.

18 Venue and jurisdiction are proper in this Court and a trial  
19 date has been set for July 19, 2006. Non-expert discovery is  
20 scheduled to conclude no later than January 17, 2006. The  
21 present motion was served nearly eight months after Forward Air's  
22 complaint was served.

23  
24 **STANDARD**  
25

26 Federal Rule of Civil Procedure 14 permits parties to bring  
27 a lawsuit against, or "implead," a third party who is not already  
28 a party to the lawsuit in order to transfer liability being

1 asserted against it in the underlying lawsuit. Specifically,  
2 Rule 14 provides:

3 "At any time after commencement of the action, a  
4 defending party, as a third-party plaintiff, may cause  
5 a summons and complaint to be served upon a person not  
6 a party to the action who is or may be liable to the  
7 third-party plaintiff for all or part of the  
8 plaintiff's claim against the third-party plaintiff.  
9 The third-party plaintiff need not obtain leave to make  
10 the service if the third-party plaintiff files the  
11 third-party complaint not later than 10 days after  
12 serving the original answer. Otherwise the third-party  
13 plaintiff must obtain leave on motion upon notice to  
14 all parties to the action."

15 Fed. R. Civ. P. 14(a).

16 Rule 14 is to be construed liberally in favor of allowing  
17 impleader. Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389,  
18 393 (1st Cir. 1999). However, the District Court has broad  
19 discretion in determining the propriety of a third-party claim  
20 under Rule 14. See Southwest Admin., Inc. v. Rozay's Transfer,  
21 791 F.2d 769, 777 (9th Cir. 1986). The Court is to consider all  
22 relevant factors of each individual case including whether the  
23 delay in seeking leave was excusable and whether the delay would  
24 prejudice a party. In addition, the Court does not abuse its  
25 discretion by denying an application that will disadvantage an  
26 existing action. Id.

### 27 ANALYSIS

28 Defendant Forward Air served an answer to Plaintiff's  
complaint on March 25, 2005. Forward Air moved to add Cook on  
November 4, 2005, nearly eight months after service of their  
original answer. As set forth above, Rule 14 provides that a

1 party may add a third party anytime after commencement of the  
2 action except that leave of court is required for attempts to  
3 join a third party more than 10 days after service of the  
4 original answer. In addition, this Court's Pretrial Scheduling  
5 Order provides that no additional joinder of parties shall be  
6 permitted without good cause having been shown. See Amended  
7 Pretrial Sched. Order at 1, August 15, 2005. Because Forward Air  
8 did not seek to add Mr. Cook within ten days of serving its  
9 complaint, it must show good cause for seeking to doing so now.

10 Forward Air avers that, through recent deposition testimony,  
11 new facts were unearthed giving rise to its need to join Mr. Cook  
12 at this late stage in the litigation. Specifically, Forward Air  
13 claims the following are newly discovered facts: a) Controlling  
14 law would have required Mr. Cook to exit the lane of travel if at  
15 all possible; b) the curb at the scene was approximately 4 1/2  
16 inches in height with a level grassy area immediately opposite  
17 the curb; c) all vehicles came to abrupt stops on the day of the  
18 accident with some being described as "panic stops."

19 Plaintiffs, together with Defendant Hertz Corporation  
20 ("Hertz"), object to Forward Air's motion. Plaintiffs contend  
21 first that Forward Air has made no mention of any potential third  
22 party claim despite its numerous previous filings including its  
23 Answer, the Joint Status Conference Statement, its Motion for  
24 Change of Venue and its objection to this Court's Pretrial  
25 Scheduling Order. In addition, Plaintiffs argue that Forward  
26 Air's motion should be denied because the proposed third party  
27 complaint fails to indicate any potential or possibility for  
28 obtaining personal jurisdiction over Mr. Cook. Lastly,

1 Plaintiffs assert that permitting Forward Air leave to add Mr.  
2 Cook will cause them undue hardship as this motion comes on the  
3 eve of non-expert discovery cutoff and only six months prior to  
4 trial.

5 Hertz' argument mirrors Plaintiff's argument that the Court  
6 should deny Forward Air's motion because personal jurisdiction  
7 over Mr. Cook does not exist. In addition, Hertz claims that the  
8 facts alleged as newly discovered by Forward Air unquestionably  
9 existed at the time of the accident and, therefore, could have  
10 been known from the outset.

11 As an initial matter, neither the parties nor the Court have  
12 any facts to sustain an argument that personal jurisdiction  
13 against Mr. Cook is lacking. There is no evidence whatsoever  
14 regarding his contacts with this forum. Mr. Cook may have  
15 numerous contacts or he may have none at all. Accordingly,  
16 personal jurisdiction is an insufficient basis to deny Forward  
17 Air's motion.

18 With respect to whether good cause exists because Forward  
19 Air only recently unearthed facts that compel it to add Mr. Cook,  
20 the Court finds that Forward Air has failed to meet its burden.  
21 As noted above, good cause must be shown before the Court will  
22 permit Forward Air leave to add Mr. Cook. Forward Air's argument  
23 that it is now privy to facts previously unknown is disingenuous.  
24 The height of the curb and the existence of the flat grassy area  
25 were clearly known at the moment of the accident as well as at  
26 all times thereafter. A simple observation of the area was all  
27 that was required. The suddenness of the stops made by all four  
28 vehicles was, likewise, clearly known at the time of the

1 accident. The Texas Transportation Code section cited by Forward  
2 Air as support for its need to add Mr. Cook was enacted in  
3 September, 1995, nearly eight years before this accident.  
4 Forward Air's attempt to characterize as obscure these fully  
5 conspicuous facts is unpersuasive.

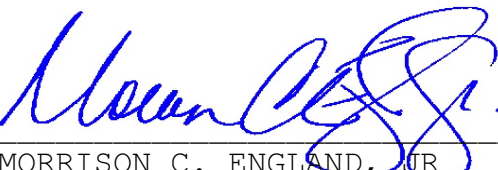
6 Lastly, Forward Air has waited until the eve of the non-  
7 expert discovery deadline to bring this motion. Granting Forward  
8 Air's motion now could arrest the trial's advancement and result  
9 in additional expense to the parties. These consequences are  
10 unacceptable in light of Forward Air's failure to justify its  
11 extreme delay.

12  
13 **CONCLUSION**  
14

15 Forward Air has failed to satisfy its burden of showing good  
16 cause for leave to add a third party. Accordingly, its motion is  
17 DENIED.

18  
19 IT IS SO ORDERED.

20 DATED: December 15, 2005

21  
22  
23   
24 MORRISON C. ENGLAND, JR.  
25 UNITED STATES DISTRICT JUDGE  
26  
27  
28